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INTRODUCTION: ON DOING SOMETHING ABOUT IT

RUSSELL D. NILES*

This special issue of the *Missouri Law Review* is a fitting tribute to William Franklin Fratcher, R.B. Price Distinguished Professor of Law at the University of Missouri-Columbia. He is one of the most prolific scholars of his generation. He has earned the respect of his peers and the admiration and affection of a large complement of students, who have been soundly trained in the history and system of the common law and who have, through his example, developed an interest in the improvement of the law by carefully researched and lucidly phrased statutes. His bibliography, reprinted in this volume, demonstrates both the breadth of his interest and the depth of his research.

It is especially fitting that the articles in this issue were written by some of the most distinguished scholars in his field, and that their contributions reflect his interest in English and American legal history, in basic legal theory, and in the contemporary refinement of the law through selective codification.

I should like to make a few comments on a problem that Professor Fratcher has obviously faced many times: if a scholar in his research develops an idea for the reform or simplification of the law, what should he do about it? When David Cavers was a young teacher he wrote an article on the elimination of the "laughing heir." He commented:

[T]oo many problems of adapting law to the needs of our time press for solution to allow one to indulge the fancy that a wave of popular indignation will one day submerge the "laughing heir." Social change in matters of this sort is effected less dramatically. . . . The role of the . . . [reformer] will not, in all probability, be played by a Bentham of the future. Doubtless, the work will be accomplished, rather prosaically, by some law revision commission. When it is done, we shall wonder why it was not done sooner.¹

Obviously, a scholar who hits upon a good idea can often do no more than write his commentary, his reflections, his conclusions, and trust that what he has written will someday, somewhere, be useful in the massive movement toward the improvement of the law. But I have come to the conclusion that if a professor has a good idea, and thinks that its time has

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1. Cavers, *Change in the American Family and the "Laughing Heir,"* 20 IOWA L. REV. 203, 214-15 (1935).

come, he has a duty at least to try to do something about it. Professor Fratcher has had many good ideas, and he has dared to do something about them—even submit them to the ultimate test: reducing them to statutory form.

When I started teaching, a half century ago, reform by codification was not in high favor. It was fashionable, in New York at least, to deride the New York Revision of 1830² and to denigrate the ambitious codes of David Dudley Field.³ It was a time of great enthusiasm for the restatement of the law under the auspices of an evangelical American Law Institute.⁴

In 1935, I was asked to contribute an article to *Law, A Century of Progress*, a three-volume work commemorating the founding of the New York University School of Law. My topic was the development of estate law since 1830,⁵ when Butler and his collaborators had completed the Revision of the New York Statutes and Kent had published the final volume of his *Commentaries*.⁶ At the time I was writing, the first Restatement of Property was in its early drafts.⁷ My project was to determine how far the New York Revision had anticipated and contributed to the progress in the law of estates during the period of a century. Perhaps influenced by the writings of John Chipman Gray⁸ and James Coolidge Carter,⁹ I started with the traditional academic prejudice against the Revision. But in the course of preparing my article, I changed my estimate of the Revision and concluded that, except for the Rule Against Perpetuities, the Revisers had saved New York a century in the modernization of the law of estates and undoubtedly had contributed to the modernization of the law in other states.¹⁰

The Revisers were strongly influenced by Jeremy Bentham,¹¹ and they wanted to sweep away much of the old learning and to start afresh.¹² They

2. The part of the revision relating to land was passed in December 1828 and became effective January 1, 1830. R. FOWLER, *HISTORY OF THE LAW OF REAL PROPERTY IN NEW YORK* 92 n.5 (1895). See also Canfield, *The New York Revised Statutes and the Rule Against Perpetuities*, 1 COLUM. L. REV. 224, 224-34 (1901).

3. See generally DAVID DUDLEY FIELD, *CENTENARY ESSAYS* (A. Reppy ed. 1949) (introduction by Russell D. Niles) [hereinafter cited as *FIELD ESSAYS*]. For critical comment, see J. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW* (1884).

4. Goodrich, *Restatement and Codification*, in *FIELD ESSAYS*, *supra* note 3, at 241.

5. Niles, *The Law of Estates Since Butler and Kent*, in *LAW, A CENTURY OF PROGRESS* (1937).

6. J. KENT, *COMMENTARIES ON AMERICAN LAW* (1830). See F. HICKS, *MEN AND BOOKS FAMOUS IN THE LAW* 134-58 (1921).

7. Six tentative drafts appeared, beginning in March 1929, with a final draft of Volumes I & II approved in 1936.

8. J. GRAY, *THE RULE AGAINST PERPETUITIES* § 750 (3d ed. 1915).

9. J. CARTER, *LAW, ITS ORIGIN, GROWTH AND FUNCTIONS* (1907).

10. Niles, *supra* note 5, at 234-35.

11. See Gregory, *Bentham and the Codifiers*, 13 HARV. L. REV. 344, 344-57 (1900).

12. See W. HUMPHREYS, *OBSERVATIONS ON THE ACTUAL STATE OF THE ENG-*

were radical reformers and they were very young: their average age was about thirty.¹³ (James Kent, much their senior, was asked to join in the revision process but he disdained to do so.¹⁴ He had revealed his reverence for traditional judge-made law in his *Commentaries*.) There was, of necessity, no academic collaboration in the Revision. Kent was the only lecturer at Columbia.¹⁵ Butler's law school at New York University was not yet in existence.¹⁶ The Revisers were practicing lawyers. While they were unquestionably able and public-spirited men,¹⁷ they did not have what we now consider the necessary preparation or assistance to draft an authoritative code.

In 1848, one of the greatest figures of the reform movement, David Dudley Field,¹⁸ succeeded in having part of his Code of Civil Procedure adopted in New York.¹⁹ It is now generally recognized that his codification of civil procedure has had a significant and widespread influence on modern law.²⁰ His codes of substantive law were not so successful. It is also evident that in the middle of the nineteenth century the substantive common law was not ripe for codification.²¹ Field, nevertheless, remains a heroic figure. It is amazing what a busy lawyer, working largely alone and unpaid, was able to accomplish.²² This is not the time or place for a defense of Field or of his substantive law codes—indeed, in the current revision of the California probate law the sections taken from the Field code now often impede rather than promote reform²³—but his spirit and dedication, his

LISH LAWS ON REAL PROPERTY WITH OUTLINES FOR A SYSTEMATIC REFORM 275-80 (2d ed. 1827) (cited by Revisers).

13. W. BUTLER, *THE REVISION AND THE REVISERS* 22-23 (1889).

14. Niles, *supra* note 5, at 234-35.

15. A. HARNO, *LEGAL EDUCATION IN THE UNITED STATES* 18 (1953).

16. In 1835, Benjamin F. Butler submitted to the Council of New York University his plan to establish a school to give systematic instruction in legal science. The school was established in 1838, with Butler as principal of the faculty. Niles, *supra* note 5, at 235.

17. Butler, for example, was Attorney General in the cabinets of Presidents Jackson and Van Buren; John Duer was Chief Justice of the Superior Court in New York; John C. Spencer was President Tyler's Secretary of War. *Id.* at 234-35.

18. See Pound, *David Dudley Field: An Appraisal*, in *FIELD ESSAYS*, *supra* note 3, at 3.

19. Act of Apr. 12, 1948, ch. 379, 1848 N.Y. Laws 497. See Reppy, *The Field Codification Concept*, in *FIELD ESSAYS*, *supra* note 3, at 17, 35.

20. Pound, *supra* note 18, at 9; Clark, *Code Pleading and Practice Today*, in *FIELD ESSAYS*, *supra* note 3, at 55.

21. Pound, *supra* note 18, at 7.

22. *Id.* at 9, 11.

23. Niles, *Probate Reform in California*, 31 *HAST. L.J.* 185 (1979). In the California Civil Code, many sections are obsolete when examined in the light of contemporary scholarship. Compare, for example, the following: CAL. CIV. CODE § 709 (West 1982) (illegal precedent conditions) with *RESTATEMENT (SECOND) OF PROPERTY* § 5.2 (Tent. Draft No. 2, 1979) (effect of impossibility of performance); CAL. CIV.

willingness to "do something about it," will make him a significant figure in law reform long after his detractors are forgotten.²⁴

The bewildering confusion of state probate statutes has long offered a challenge to scholars. In 1940, Professor Thomas Atkinson, then a professor at the University of Missouri School of Law, wrote an article calling for creation of a model probate code.²⁵ The University of Michigan had the resources to undertake the venture and the right person to assume responsibility for it: Professor Lewis M. Simes.²⁶ Professor Simes, Professor Atkinson, and Professor Paul E. Basye,²⁷ with the advice of a committee appointed by the Section of Real Property, Probate and Trust Law of the American Bar Association,²⁸ hammered out the Model Probate Code in three years.²⁹ The Code was based on a number of systematic and detailed monographs, mostly by Professors Basye and Simes.³⁰ It was an academic achievement of the first magnitude.³¹

Although the Model Probate Code had substantial influence, it was not widely adopted. It did not have the organized support necessary to overcome legislative inertia and the loyalty of practitioners to the forms and procedures to which they were accustomed.

In the early 1960's, a small group of officers of the Section of Real Property, Probate and Trust Law met with me in New York: Professor Basye, then of Hastings College of the Law;³² Harrison F. Durand, of the New York Bar;³³ J. Pennington Straus, of the Pennsylvania Bar;³⁴ and a

CODE § 710 (West 1982) (restraints on marriage) *with* RESTATEMENT (SECOND) OF PROPERTY §§ 6.1-.3 (Tent. Draft No. 2, 1979) (same); CAL. CIV. CODE § 711 (West 1982) (restraints on alienation) *with* RESTATEMENT (SECOND) OF PROPERTY §§ 4.1-5.5 (Tent. Draft No. 2, 1979). It was the last-mentioned section of the California Code that reached its *reductio ad absurdum* in the famous California "due on sale" decisions, Dawn Investment Co. v. Superior Ct., 30 Cal. 3d 695, 639 P.2d 974, 180 Cal. Rptr. 332 (1982); Wellenkamp v. Bank of America, 21 Cal. 3d 943, 582 P.2d 970, 148 Cal. Rptr. 379 (1978).

24. Pound, *supra* note 18, at 7, 16.

25. Atkinson, *Wanted—A Model Probate Code*, 23 AM. JUD. SOC'Y 183 (1940).

26. See Simes, *The Model Probate Code—An Achievement in Cooperative Research*, 29 AM. JUD. SOC'Y 71 (1945).

27. Professor of Law, University of Kansas City; Research Associate, University of Michigan. Presently Professor of Law, Hastings College of the Law.

28. See Atkinson, *Codification of Probate Law*, in FIELD ESSAYS, *supra* note 3, at 177, 197.

29. Atkinson, *supra* note 28, at 197.

30. See Niles, *Model Probate Code and Monographs on Probate Law: A Review*, 45 MICH. L. REV. 321 (1946); L. SIMES & P. BASYE, PROBLEMS IN PROBATE LAW 383 (Mich. Legal Series 1946).

31. Niles, *supra* note 30; Rheinstein, *The Model Probate Code: A Critique*, 48 COLUM. L. REV. 534 (1948).

32. Chairman, Section of Real Property, Probate and Trust Law, 1965-1966.

33. Chairman, Section of Real Property, Probate and Trust Law, 1964-1965.

young law teacher, William F. Fratcher. We decided to recommend to the Section that it sponsor a uniform code based on the Model Probate Code. The Section would finance the project, appoint committees to draft the code, and furnish the forum for debates and discussions. It would ultimately attempt to induce the national organizations, the Commissioners on Uniform State Laws and the American Bar Association, to bring the code to the attention of local bar associations and state legislatures.³⁵

I had nothing to do with drafting the code, but Professor Fratcher did. I believe that with the exception of the Chief Reporter, Professor Richard V. Wellman,³⁶ Professor Fratcher was the most influential academic contributor. He brought to his task enormous erudition, along with knowledge of both American and English law and procedure. He was not weighed down by the bulk of his learning; rather, he was able to present some of the new code's most advanced and progressive ideas.

I consider the Uniform Probate Code to be the most significant accomplishment in its field. It is a vindication of the codifying process, when it is undertaken at the right time, by the right persons, under the right sponsorship. It represents an ideal collaboration of practicing lawyers, judges, and scholars. The Code had the benefit of careful preparatory work, including the Model Probate Code and its monographs. Its early drafts were subject to criticism from all branches of the profession, and it had to be defended against the attacks of many special interest groups. It is now clear that the Code has stimulated interest and debate in all states. It has made the trend toward reform and uniformity evident and, I think, inevitable.³⁷

Even with the accomplishment of the great restatements, few would claim that American law is ready for general codification. It is significant, however, that the American Law Institute has changed its early aversion to codification and sponsored an increasing number of codes.³⁸

Since both the Institute and the Commissioners on Uniform State Laws have welcomed the collaboration of academic lawyers from the beginning, the opportunities for professors to do something constructive has never been better. Law teachers and practicing lawyers have complemen-

34. Chairman, Section of Real Property, Probate and Trust Law, 1962-1963.

35. The Uniform Probate Code was approved by the National Conference of Commissioners on Uniform State Laws and by the American Bar Association in August 1969.

36. Professor of Law, University of Michigan. Presently Professor of Law, University of Georgia. See Wellman, *The New Probate Code*, 56 A.B.A. J. 636 (1970); Wellman, *The Uniform Probate Code: Blueprint for Reform in the 70's*, 2 CONN. L. REV. 453 (1970).

37. The Joint Editorial Board for the Uniform Probate Code (Richard V. Wellman, Educational Director) has published *UPC Notes* twice a year since July 1972, to report on adoptions and progress toward adoptions in the various states. The offices of the Joint Editorial Board are at Suite 510, 645 N. Michigan Ave., Chicago, IL 60611.

38. Goodrich, *supra* note 4, at 249-50.

tary roles. Scholars have the time and opportunity to generate ideas, the skill to draft statutes without excessive detail, and the training to see a problem in broad context. Practitioners have the experience to analyze, challenge, and constrain. The two groups are better together than alone. The experience of the past suggests that good ideas must neither be permitted to languish because of academic reticence nor yet frozen into statutory form too soon.

Interesting questions of when it is better to codify and when it is better to wait are presented by the recently approved division of the Restatement (Second) of Property on "Donative Transfers." Part II, insofar as it relates to the new reasonableness approach to restraints on alienation (especially disabling restraints) will probably require more time before codification is practical.³⁹ Part III, as it relates to restraints on personal conduct (for example, marriage, remarriage, or cohabitation without marriage) clearly lacks a present consensus.⁴⁰ But Part I, relating to the Rule Against Perpetuities, may finally be ready for a uniform statute. At the height of the debate on the wait-and-see rule, Professor Louis Lusky offered the Reporter a compromise based on the modified wait-and-see statute in Massachusetts and stated that Professor Richard B. Powell would also agree.⁴¹ Today, with all elements of the problem fresh in the minds of many scholars and practitioners, an authoritative statute could be drawn.

The authors of articles in this issue properly suggest that some old problems are now ready for remedial statutes. Professor Halbach's suggestions as to when adopted persons and children born out of wedlock should be included in class gifts are especially timely.⁴² His suggestions about rules of construction to minimize litigation in gifts to single-generational and multi-generational classes⁴³ deserve to be reduced to statutory form. Significantly, the California Law Revision Commission has requested Professor Halbach to submit draft sections for possible inclusion in the revised probate code.

Professor Scoles, having made a strong case for succession without administration (with a reminder of how common such administration has been historically in some western states), has proposed a free standing act⁴⁴

39. See American Law Institute, Proceedings, 57th Annual Meeting 145-89 (1980). Of particular interest are the comments of Mr. William L. Maybury and the Reporter. *Id.* at 163-67.

40. See American Law Institute, Proceedings, 55th Annual Meeting 257, 297 (1978).

41. American Law Institute, Proceedings, 56th Annual Meeting 424-81, 493-521 (1979).

42. Halbach, *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333 (1983).

43. *Id.* at 350-57.

44. Scoles, *Succession Without Administration: Past and Future*, 48 MO. L. REV. 371 (1983).

which is an adaptation of the recent amendment to the Uniform Probate Code.⁴⁵ Such an act could be of great importance in a state, such as California, that is not ready for the entire Code but is receptive to important parts of it.

Professor Effland, in his article,⁴⁶ has suggested several problems about the treatment of non-probate assets which may need more debate, but a statute making property which is subject to a donor's power of revocation available to the donor's creditors is surely overdue. The New York Revisers saw this clearly in 1830. So is the need to change the rule invalidating a gift over of what remains at the death of the first taker in fee if the first owner had complete freedom of alienation during life and freedom of testation at death, as Professor Fratcher has suggested (with wit) in his article.⁴⁷ As he points out, the Restatement now agrees.⁴⁸

Of all Professor Fratcher's accomplishments, I believe that his most lasting contributions will be those that have resulted in statutory reforms. Although many of his proposals have been incorporated in uniform codes, such as the Uniform Probate Code and the Uniform Trustees' Powers Act,⁴⁹ many more have been added to the statutory law of his adopted state.⁵⁰

Happily, codification as a method of law reform has come out of the shadow. If we American lawyers, both practicing lawyers and academic lawyers, have learned the lessons of some of the gallant failures of the past, we may yet reach the proper balance between scholarly research and practical action.

45. UNIF. PROBATE CODE §§ 3-312 to 3-322 (1982).

46. Effland, *Rights of Creditors in Nonprobate Assets*, 48 MO. L. REV. 431 (1983).

47. Fratcher, *Bequests of Orts*, 48 MO. L. REV. 475 (1983).

48. *Id.* at 480. See RESTATEMENT (SECOND) OF PROPERTY § 4.2 (Tent. Draft No. 3, 1980).

49. See Fratcher, *Trustees' Powers Legislation*, 37 N.Y.U. L. REV. 627 (1962), cited in Foreword to UNIF. TRUSTEES' POWERS ACT (1964). See also Fratcher, *Powers and Duties of Guardians*, 45 IOWA L. REV. 264 (1960); Fratcher, *Toward Uniform Guardianship Legislation*, 64 MICH. L. REV. 983 (1966).

50. Especially note the articles relating to Missouri law, under the heading "Local Articles," in Professor Fratcher's bibliography.

